Supreme Court, U.S.
FILED
AUG 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1849

In The

Supreme Court of the United States

October Term, 1986

Frances Lola Womack, Individually, and as Surviving Spouse of William Sydney Womack, Deceased,
and
James A. Chandler and wife, Iva I. Chandler,
Petitioners,

v.

Donald J. Gettelfinger & wife, Doris Y. Gettelfinger, d/b/a Gettelfinger Farms
and
Charles S. Ritter,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF

DONALD K. VOWELL
RAINWATER, HUMBLE & VOWELL
2037 Plaza Tower
Post Office Box 2775
Knoxville, TN 37901
(615) 525-0321
Counsel of Record for the Respondents

JOSEPH B. YANCEY
918 State Street
Knoxville, TN 37902
(615) 637-1776
Counsel for the Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
I. Argument	1
A. "Dodging" Weight Scales?!	1
B. Substantial Evidence v. Any Evidence	2
1. Tennessee Law	2
2. Changed Their Mind	4
II. Conclusion	5
Appendix A	App. 1
Appendix B	App. 9

TABLE OF AUTHORITIES

Page

CASES

Cude v. Culberson, 209 S.W.2d 506 (Tenn. App. 1947) ... 3

D. M. Rose and Company v. Snyder, 206 S.W.2d 897 (Tenn. 1947) ... 3

Phelps v. Magnavox Company of Tennessee, 497 S.W.2d 898 (Tenn. App. 1972) ... 3

Potter v. Tucker, 688 S.W.2d 833 (Tenn. App. 1985) ... 3

I. ARGUMENT

A. Dodging Weight Scales?!

In their Reply Brief the Petitioners claim as "Actual fact shown" that Mr. Ritter was "illegally dodging the weight scales on the interstate; . . ." We expect vigorous advocacy on the part of counsel, and we can understand an occasional inaccuracy, but this claim appears to be an intentional misrespresentation of the facts. To illustrate the point we have included, as Appendix A to this brief, copies of each page of the record cited by the Petitioners for their "Actual fact shown" (Appendix, Court of Appeals, 114, 170-171, 216, 230-32, 263, 395). In those pages Larry Goode, the Petitioners' expert in truck driving, testified that certain weight scales on I-40 could be avoided by taking the Highway 95 exit and driving *south* on Highway 95 around the scales, and he admitted that on a previous occasion several years earlier he had used that route to avoid the scales. Mr. Goode also testified that Mr. Ritter had been riding with him on that previous occasion. Be that as it may, the accident at bar occurred on Highway 95 several miles *north* of I-40. More importantly, neither in the pages cited by the Petitioners, nor anywhere else in the record, is there any indication that the truck was overweight in the first place, much less that Mr. Ritter was dodging weight scales.

Having reviewed the pages the Petitioners refer to as citations for their claim, we turn to certain other pages of the record *not* referred to by the Petitioners, but which the Court will find highly informative. These pages (Appendix, Court of Appeals, 217-220), included in this brief as Appendix B, contain the comments of the Trial Court and Counsel at a certain bench conference.

In the bench conference the question was raised of whether the truck was overweight. The response of Petitioners' counsel was "We can't prove that . . . . Well, I think we can't prove he was overweight." Appendix B, this brief, at App. 10. Counsel had asked the Court's permission to question the witness about a previous occasion when the witness had turned around to avoid the weight scales. After hearing Counsel's admission that he had no evidence that Mr. Ritter's truck was overweight, the Court instructed Counsel that he might ask the witness whether he turned around, but not why he turned around, and admonished "Don't try to say he was dodging the scales." Appendix B, this brief, at App. 10-11.

Thus we see that the Petitioners are not content with the facts of their case. Although they now claim the "Actual fact shown" is that Mr. Ritter was illegally "dodging" weight scales, their counsel admitted at trial that they had no proof the truck was overweight and no witness ever suggested that Mr. Ritter was on the road for other than his stated purpose of looking for diesel fuel. Such hyperbole and characterization is typical of the Petitioners' case as a whole.

B. Substantial Evidence v. Any Evidence—Tennessee Law

1. Tennessee Law

In the Reply Brief the Petitioners embellish what they perceive as a fundamental distinction in the standard by which the Tennessee courts and the Federal courts review motions for directed verdict. The Federal standard requires "substantial" evidence, say the Petitioners, whereas Tennessee merely requires "any" evidence to avoid the motion. Petitioners' Reply Brief, at 15.

The position of the Respondents is that there is little or no difference in the standards and that it makes no difference which is used. As with all jurisdictions, Tennessee has numerous cases which discuss this point and all of the cases use slightly different language. The Petitioners have seized upon one particular case, *Potter v. Tucker,* 688 S.W.2d 833 (Tenn. App. 1985), without advising the Court of the other relevant authorities. The opinion in *Potter v. Tucker* does state that the Court should not direct a verdict if there is "any material evidence" in the record to support it.

However, the Tennessee Supreme Court holds that the standard is "whether there was any *substantial evidence* to support the verdict" (emphasis added). *D. M. Rose and Company v. Snyder,* 206 S.W.2d 897, 901 (Tenn. 1947). That ruling was followed in *Phelps v. Magnavox Company of Tennessee,* 497 S.W.2d 898, 904 (Tenn. App. 1972).

The Tennessee Court of Appeals in *Cude v. Culberson,* 209 S.W.2d 506 (Tenn. App. 1947), reiterates that "substantial" and "material" evidence must be shown, and then defines "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Further, "more than a 'scintilla' is requisite . . . ," and more than a 'spark or glimmer' is required." *Cude v. Culberson,* at 511-512. Then the Court points out:

> With the tacit approval of our Supreme Court, this Court has said "The mere dogmatic assertion which does not appeal to the reason of the court, which does not have substantial and relevant consequence, which does not have fitness to induce conviction, is not proof even if uncontradicted, and does not interfere with

the duty of the court to direct a verdict." *Cude v. Culberson,* at 512.

2. Changed Their Mind

Although the Petitioners now claim that Tennessee goes by the "any evidence" standard, they have previously recognized in these proceedings the correctness of the "substantial evidence" standard. On page one of their brief to the Court of Appeals they listed the issues presented for review. Their first issue was as follows:

> 1. Was the jury's verdict of punitive damages supported by *substantial evidence?* (Emphasis added.)

It is fitting, and indicative of the merits of the Petitioners' case, that they open their argument in the Court of Appeals by asserting that the "substantial evidence" standard should be used and then close their argument before the Supreme Court by urging that it should not have been used!

II. CONCLUSION

For the additional reasons set out herein, the Respondents pray that the Petition be found to be without merit, and accordingly denied.

Respectfully submitted,

DONALD K. VOWELL
RAINWATER, HUMBLE & VOWELL
2037 Plaza Tower
Post Office Box 2775
Knoxville, TN 37901
(615) 525-0321

Counsel of Record for the Respondents

JOSEPH B. YANCEY
918 State Street
Knoxville, TN 37902
(615) 637-1776

Counsel for the Respondents

APPENDIX A

Ritter/Direct

(p. 114) Q. You don't remember that?

A. No, sir.

Q. All right. When you got off the interstate, when you come down there to 95 are there any service stations or anything that is there immediately at that exit?

A. No, sir.

Q. It is just essentially a rural area?

A. Yes, sir.

Q. But you turned left and went the direction we call north toward Oak Ridge?

A. Yes, sir.

Q. And the sign said it would be Melton Hill Dam in that direction, didn't it?

A. I don't remember seeing it.

Q. If the sign had said Melton Hill Dam, would you have known there might be more fog at that point?

A. Yes, sir.

Q. So you turned in the direction going to Oak Ridge and you had to drive for a half a mile before you come to the first restaurant or anything?

A. No. I don't know because I didn't—I didn't—I was just driving to find a—excuse me—

• • •

(p. 170) actually come down on the axle or does it come down on the wheels?

A. It comes down on the wheels.

Q. I got confused on that. You don't mean clear down to the axle?

A. No. Clear down to the wheels, the tires.

Q. Is there any affect also in the loaded nature of a trailer as to making it tilt one way or the other?

A. Yes, sir. Your load can shift on you.

Q. Is there any difference in turning a trailer like that, a van-type trailer, when it's loaded and empty?

A. Yes.

Q. State whether or not you can turn a van-type trailer empty and have some tilt in it without having the same results you would with a loaded truck?

A. I didn't understand your whole question.

Q. Okay. That's all right. How full was that trailer?

A. Filled all the way from the front (p. 171) to the back from the floor to the top.

Q. As you sat there, you saw the ditch? Is that what you said?

A. Yes, sir.

Q. Just tell the Court and Jury what you did.

A. Well, as I was proceeding outward, I was watching in my mirrors the best—what light that I had from the

lights on the trailer, I was watching my rear wheels, keeping them away from the ditch. And by the time I looked up and I saw these headlights, and by the time I saw the headlights I couldn't tell what kind of car or nothing, I just knew it was another vehicle. And by the time I looked up, I was already crossways in the road and there wasn't no place that I could go. And I thought at first the car missed me.

Q. All right, sir. Now, Charles, before you pulled out of that driveway, did you look either direction?

A. Yes, sir.

Q. Do you know how many times?

A. Several.

Q. Could you see anything coming?

A. No, sir.

* * *

Goode/Direct

(p. 216) A. That when he went in after the accident they had him to sign 14 blank log sheets.

Q. Who had him do that?

A. Mrs. Gettlefinger the way I understood it.

Q. Had Mr. Ritter ever been on Interstate 40 before, Mr. Goode?

A. Yes, sir.

Q. With you?

A. Yes, sir.

Q. Under what circumstances?

A. Well, he used—we used to haul produce like I said earlier, and we would run into Knoxville, deliver flowers around this area and we would run into the East Coast quite a bit, so we ran 40 and 81 all the time.

Q. Had you ever been on 95?

A. Yes, sir.

Q. Had Mr. Ritter been with you when you were on 95?

A. Yes, sir.

Q. Had you ever turned around on 95?

A. Yes, sir.

Q. Did you make deliveries on Highway

* * *

Goode/Cross

(p. 230) left out on a Thursday, Friday and Saturday. It took three days to make that round.

Q. And Ritter was with you?

A. Yeah.

Q. That is either '74 or '75?

A. Yes, sir.

Q. Is that the only time you and Ritter then were ever on that road?

A. No, sir.

Q. On 95?

A. No, sir.

Q. When else in '74 or '75 one? When else besides then?

A. We had come out of Nashville, Tennessee hauling produce and was coming up to Virginia and the D.O.T. was checking on the scales, and I don't cross the scales if I can keep from it with the Department of Transportation there.

Q. Okay. You were driving?

A. Right.

Q. And you were operating what kind of a vehicle that day?

A. I was driving a Freight Liner, White Freight Liner.

(p. 231) Q. A White Freight Liner on that day?

A. Right. There was a reefer unit behind it.

Q. You were pulling a reefer unit behind?

A. Yes, sir.

Q. When was that?

A. This would have been about in '82.

Q. And Mr. Ritter was with you?

A. Yes, sir.

Q. And what kind of a trailer were you pulling?

A. It was always a 42 footer.

Q. What kind of name brand?

A. A Tempte.

Q. Tempte?

A. Tempte.

Q. And you exercised your discretion to get off of that scale, off of that place on that day; right?

A. Yes, sir.

Q. And what did you do?

A. I was going down 95. I heard the D.O.T. was coming at me, so I had to turn around and go (p. 232) back the other way to get away again and wait them out.

Q. So you were trying to dodge the scales?

A. Yes, sir. That is a known route to all truck drivers. You can get around the scale that way.

Q. How do you go when you go out 95 and dodge the scales?

A. You go up the ramp, take 95 South, come right around to the truck stop and get back on and you miss the scale.

Q. And you take 95 South?

A. Yes, sir.

Q. So that means that if you were going to try to dodge the scales like you were trying to do you would be going—and we are in a courtroom now—

A. Okay.

Q. —and we are facing in these directions. I represent this to you that is east.

A. Well—

Q. East. I am pointing toward the jury.

A. Right.

Q. Towards the door of the courtroom is south?

Goode/Redirect

(p. 263) Q. Did he say anything about the tractor?

A. No, sir, he didn't say anything about the tractor.

Q. Do you use those same kind of refrigeration units?

A. Yes, sir.

Q. If you have an eighth of a tank and you're trying to maintain a zero load, how much time do you have?

A. You figure anywhere between a gallon to two gallon an hour on fuel.

Q. A gallon to two gallons an hour?

A. Yes, sir.

Q. If it holds 50 gallons, then, how many hours are you talking about if you have, say, down to an eighth of a tank?

A. Well, I don't know the capacity of the units on their trailers. Some units have 30, some have 50 gallon.

Q. Assume the testimony in this case is the 50 gallons.

A. You would say four hours, three

* * *

Walker—Redirect

(p. 395) A. There is the sign of the state route below it with the posted weight limit on the road, twelve tons, saying that there shouldn't be any loaded vehicles on this road.

Q. How much does a tractor-trailer truck normally weigh loaded?

Mr. Yancey: Your Honor, this interfered with the ruling of the Court previously and Mr. Vines well knows that and I object to that question.

The Court: Sustained. That's irrelevant. Go on.

The Witness: Here at the intersection, like I say, there's construction on it now. We turned to the left. Going back under the interstate to the left on the other side there was some construction when we were down there. There were not any buildings of any kind but there was construction going on.

By Mr. Vines:

Q. Are there any service stations or anything at this exit in the immediate vicinity like you sometimes see?

APPENDIX B

Goode/Direct

(p. 217) 95?

A. Yes, sir.

Q. Were you on 95 for any reason other than—wait just a moment. Maybe we had better get a ruling on that.

(Thereupon, a discussion was had at the bench out of the hearing of the jury.)

Mr. Vines: Your Honor, this witness is prepared to testify that he used this road to duck the scales, that they had turned around at this location before when they heard about the D.O.T. Now, realize that in this case the first car that came on the scene was a D.O.T. car and this man was turning around. We think we know why he was turning around. A D.O.T. car was coming his way, he hears it on the radio and that is why he turns at this place.

Mr. Yancey: No.

Mr. Vines: He said he was off going to get fuel. It goes to his credibility.

Mr. Yancey: I think it's a terrible error to put this into the record at this time.

Mr. Vines: There was a D.O.T. car coming. Anybody on the radio would know that.

(p. 218) The Court: The plaintiff's position is that somebody warned Mr. Ritter on the radio?

Mr. Yancy: There is no evidence he was overweight.

Mr. Vines: We can't prove that.

The Court: Why would he be trying to avoid the scales?

Mr. Vines: Well, I think we can't prove he was overweight. I think that is a reasonable implication. All we can do is try to piece together the evidence.

Mr. Yancey: There was no reason to dodge the scales.

Mr. Tarpy: It would be implied he was overweight.

Mr. Vines: The only thing we can offer really is to his credibility and that is—

The Court: Is he going to testify that he and Ritter had turned around there before?

Mr. Vines: Yes.

The Court: That is relevant. I guess the only problem is whether or not he (p. 219) was doing it for the purpose of dodging the scales.

Mr. Vines: He will say and he said what were you doing there and Ritter said, you know why he was there, but he never actually said I was dodging the scales. That is what he has told me but he didn't say it in so many words. He doesn't know that.

Mr. Tarpy: He can't testify what he doesn't know.

Mr. Yancey: I think it is not error to let him testify he turned around. I can't see going into the rest of it. They have no proof that he was overweight.

The Court: I think what I will do I am going to let you go into everything except the motive for turning around. I think it may be probative but not prejudicial.

Mr. Vines: I am not sure I understand your ruling. What can I ask him?

The Court: Anything except why they were turning around. Don't try to say he was dodging the scales.

Mr. Vines: Or why they had turned (p. 220) around before?

The Court: But the fact they had turned around you can go into.

(Thereupon, the proceeding continued in the presence of the jury.)

By Mr. Vines:

Q. Mr. Goode, it's important to answer only the direct question I ask you.

A. Okay, sir.

Q. And I will ask you had you turned around at a closed place on 95 before called the Fishing Pole when Mr. Ritter was in the truck?

A. Yes, sir.

Q. When you had turned around before, was it necessary that you block both lanes and go onto the far shoulder of the road?

A. Not that I know of, sir. Shouldn't be.

Q. In the Gettlefinger truck do you carry devices such as reflectors, triangles and flares?

A. The truck I drove did not have them in it.

Q. This certificate that you gave to Mr. Goode when he was with you and was your driver for

* * *